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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 98

EDWARD KOHN, DOING BUSINESS AS EDWARD KOHN COMPANY,

Petitioner,

vs.

JOSEPH H. FREEHILL, DIRECTOR OF PRICE STABILIZATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

BRIEF FOR PETITIONER IN REPLY.

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The respondent makes no answer to petitioner's contentions (1) that petitioner was denied the legal right to present his case to a board of review in accordance with § 497 (c) of the Defense Production Act of 1950, as amended, 50 App. U. S. C., § 2107 (c); (2) that he was denied the right to defend himself in a plenary civil action by the ruling of the Emergency Court of Appeals that he could present a defense to such action only after a judgment was entered against him and leave was granted to him to present his case on appeal to the Emergency Court of Appeals; and (3) that the Fifth Amendment to the Con-

stitution of the United States was violated in not permitting petitioner to present a brief or an oral argument to the Emergency Court of Appeals before said court dismissed the petitioner's appeal.

The respondent bases his answer upon the premise that the petitioner forfeited all of his rights by not having filed a protest with the respondent within the time limitation for filing such protest as prescribed in § 407 (a) of the Defense Production Act of 1950. This contention is based on two erroneous grounds, namely, that the Herlong Amendment to the Defense Production Act, enacted by The Congress on July 31, 1951, is not a law but merely a prescription which was not of any force and effect until the respondent deemed it advisable to put into effect a regulation in accordance with said prescription. In other words, it is respondent's contention that the petitioner was liable for plenary damages for the months of August and September, 1951, although the charges which he made for his products were in accordance with the law passed by The Congress on July 31, 1951, because the respondent did not for some unknown reason issue a regulation which was in accordance with the law passed by The Congress. This contention entirely disregards the legal meaning of the word, "hereafter," as construed by various courts of this land. Moreover, the respondent in his construction of the Herlong Amendment disregards the entire purpose and intent of The Congress in passing said amendment which was to do away with arbitrary prices set by the respondent without any regard for margins of profits over costs which The Congress after many hearings determined should, in all fairness and equity, be allowed to sellers of materials at retail or wholesale.

See *Wendell* v. *Lavin*, 158 N. E. 42, 246 N. Y. 115; *Nelson* v. *State*, 46 N. E. 943, 17 Indiana App. 403; *Westwego Canal & Terminal Company* v. *Louisiana Highway Commission*, 9 So. 2d, 389, 200 La. 990.

This court in the case of *Vermilya-Brown Company, Inc., et al.* v. *Connell,* 335 U. S. 377, page 386, 69 Supreme Court Report 140, page 145, says: " 'Words generally have different shades of meaning and are to be construed if reasonably possible to effectuate the intent of the law makers; and this meaning in the particular instance is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purpose of the law, and the circumstances under which the words were employed.' " The construction of the Herlong Amendment made by the respondent entirely disregards the context and the purpose of the law. This construction makes the respondent the law maker, and under this construction the respondent might never have taken into consideration the laws passed by The Congress and might never have put into effect any regulation which expressed the intent of The Congress. In other words, if respondent's construction of the law is followed then sellers of materials at retail or wholesale can be held liable for plenary damages for months or years after a law of The Congress became effective if the respondent did not deem it to his pleasure to issue regulations in accordance with the purpose of that law.

The case of *Safeway Stores* v. *Arnall,* 195 Fed. 2d 319, cited by the respondent does not in any manner support his contention. The court in that case merely rules that since the grounds for the objections were not included in the protest or complaint they could not be considered for the first time by the Emergency Court of Appeals. All other statements made by the court in said case are merely *obiter dicta* and do not support the attempted construction of the Herlong Amendment made by the respondent.

The second erroneous contention of the respondent in support of his premise is that § 402 (k) as amended by The Congress on June 30, 1952, does not apply to the regu-

lation issued by respondent on January 26, 1951, which is the basis for the plenary action pending in the United States District Court for the Northern District of Illinois, Eastern Division, because on the date that said amendment to the Herlong Amendment was enacted there was a regulation in effect which gave to the petitioner his right to the customary percentage margin over costs during the period from May 24, 1950 to June 24, 1950, by reason of a new regulation promulgated by the respondent on October 1, 1951, Ceiling Price Regulation 74, issued on September 15, 1951, effective October 1, 1951 (16 F. R. 9759).

The respondent in support of this contention quotes a report of the Senate Committee on Banking and Currency (pages 8 and 9 of Brief for Respondent). The language of this report shows that it was the intention of The Congress to pass the amendment to the Herlong Amendment for the purpose of giving all distributors the mark-ups required by the provisions of § 402 (k) of the Defense Production Act, and to rectify the failure of the respondent to carry out the purpose of The Congress in passing the Herlong Amendment on July 31, 1951. The respondent claims that if no rule or regulation was in effect on June 30, 1952 which gave to the seller of materials at retail or wholesale a right to their customary percentage margin over costs then the amendment to the Herlong Amendment applied to said seller, but that if the respondent at any time prior to June 30, 1952, issued a regulation which was in accord with the law of The Congress enacted on July 31, 1951, then the amendment to the Herlong Amendment no longer applied to said seller. This erroneous contention would mean that a seller could be held liable for plenary damages although his prices were in accordance with the law passed by The Congress, and that he could not avail himself of the amendment to the Defense Production Act enacted by The Congress on June 30, 1952, although the regulation which gave

him the right to the customary margin of profit over costs did not take effect until a short period prior to the passage by The Congress of the amendment to § 402 (k) enacted on June 30, 1952. This contention resolves itself to the unfair and inequitable proposition that a seller might be liable for plenary damages for a period of almost one year and could not make use of the amendment to the Herlong Amendment if the respondent at any time prior to June 30, 1952, had issued a regulation in accordance with the law passed by The Congress.

The case of *Safeway Stores* v. *Freehill,* 202 Fed. 2d 753, cited by the respondent does not support such an argument for the purpose of circumventing the law passed by The Congress. This case supports the contention made by the petitioner. In the case of *Safeway Stores* v. *Freehill,* the Emergency Court of Appeals was required to reverse the decision which it made in the case of *Safeway Stores, Inc.* v. *Arnall,* 196 Fed. 2d 510, decided on May 5, 1952, because The Congress thereafter on June 30, 1952, modified the Capehart Amendment to the Defense Production Act § 402 (d), and this court by issuing its writ of certiorari in the case of *Arnall* v. *Safeway Stores, Inc.,* 344 U. S. 803, 73 Supreme Court 19, required the Emergency Court of Appeals to take notice of the Defense Production Act amendment of 1952.

A new law passed by The Congress which by its terms is for the benefit of the petitioner cannot be denied him through a strained and incongruous construction of the law. See *Purified Down Products Corporation* v. *Freehill,* 202 Fed. 2d, page 166. Moreover, to say that a regulation is not in effect although court actions to enforce the regulation are pending in our courts is to disregard the meaning of the words "remain in effect." If the regulation was not in effect it could not be the basis for a court proceeding commenced in June of 1952. The Congress in enacting the

amendment of June 30, 1952, could have excluded violations of regulations theretofore promulgated. The law contains no exceptions to the applicability of the law, and the respondent, in attempting to construe the law as meaning other than what it says, must support its contention with established law.

Plenary actions are not favored by this Court, and the benefit of any doubt will be given to the defendant in such an action. Penal statutes must be strictly construed. See *U. S.* v. *Corbett,* 215 U. S. 233, 242.

The petitioner respectfully submits that his protest to the respondent was not for the purpose of questioning the equity or inequity of a regulation, but was for the purpose of having determined whether or not an action for plenary damages could be brought against him by the respondent although the prices charged by him were in accordance with the law passed by The Congress.

The petitioner again respectfully requests that a writ of certiorari be issued by this court because otherwise a regulation issued by an administrator will have greater value than a law passed by The Congress and for the other reasons set forth in petitioner's petition for writ of certiorari filed herein.

Respectfully submitted,

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